United States Court of Appeals

for the Second Circuit

REPLY BRIEF

75-1388

IN THE

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DOCKET NO. 75-1388

UNITED STATES OF AMERICA,

Appellee,

v.

MAURICE BURSE,

Appellant.

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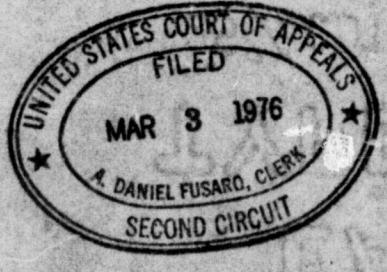

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After reviewing the Government's brief, we have determined that a short reply is appropriate in order to clarify the confusion which results from the manner of the Government's presentation.

Keeping in mind that it is not the province of a reply brief to rehash the many points raised in the principal brief, we are compelled to make this response.

POINT I

<u>This conviction should be reversed on the failure to give the requested alibi instruction standing by itself.</u>

As we have pointed out in our main brief in our first point, the Court failed to give a properly requested alibi instruction. An exception was specifically taken. The prosecutor stated he had no objection to the request. The Court indicated it would give the alibi instruction (Tr. 735) but failed to do so. A specific exception was taken (Tr. 835, 836), but nevertheless the Court refused.

The Government cites cases for the proposition that where there is no proper request it is not error to fail to give the alibi instruction, but here a proper request was made and specific exception was taken.

The Government amazingly takes the position that "if the alibi defense is not strong the instruction need not be given". We do not know what standard a trial court would set as to the "strongness" of the alibi defense, but believe that the defendant is entitled to the instruction when the

evidence presented in his behalf indicates that he was elsewhere than where the Government's witnesses say he was when he is claimed to have participated in the crime.

In this case the only witness who testified that the defendant Burse met with him the evening before the crime was the sufficiently discredited informant Debose. No other witness testified to the defendant Burse's presence with him the evening before or with him during the commission of the bank robbery. The Government weakly makes the claim that since his presence was not required during the commission of the robbery itself for a conviction on the conspiracy charge, the alibi instruction was not required. The Government cites United States v. Megna, 450 F. 2d 511 (5th Cir. 1971) for this proposition. But in Megna the same claim was made and the court reversed and remanded specifically on the failure to give the requested alibi instruction. Thus, citation to Megna is not only not helpful to the Government's argument but is in direct support of the proposition that the failure to so instruct the jury constitutes reversible error. The Government's citation to United States v. Lee is beside the point since there the court found the "evidence overwhelming".

Furthermore, the Government's weak attempt at page 7 of its brief to justify the trial court's failure to instruct the jury or take judicial notice of Sections 3 and 4 of Title 18 of the United States Code demonstrates the validity of this additional point. The trial court instructed the jury that if they found that the witness Evon Wright "might have been charged with a particular crime" they could take that into consideration on the issue of credibility. But the jury could not make an intelligent determination of whether she might have been charged unless they knew the law with respect to those Sections. As we stated to the Court in our exception to the Court's ruling that he did not so charge them, "The jury won't be able to determine that unless they hear from you what that Section says". (Tr. 731)(Appellant's brief, p. 18-20).

POINT II

The failure of the Government to make proper inquiries with respect to the photographic identification procedures regarding the witness Anna Debose prejudiced the defendant.

As we have pointed out, the defendant made a timely motion for a hearing regarding the photographic identification

procedures. A hearing was held involving only one witness, Barbara Ramos. It turned out at the trial, however, that on cross-examination of the witness Anna Debose, defendant's counsel discovered for the first time that she had been shown a photograph of the defendant Burse and had failed to identify his photograph as being one of the persons who came to her house the morning of the bank robbery. Her testimony by itself establishes the impermissively suggestive procedure used by the Government is displaying the photograph of the defendant. But, this very point aside, if the defendant's counsel had been aware of the fact that she had failed to identify a picture of the defendant within a week of the date when she said he was there, the impact upon her believability would have been substantial. It was the Government's failure to advise the defendant and the Court during the pretrial proceedings of the fact that she had been shown a picture of the defendant that gave rise to the belated discovery by the defense. The defendant was entitled to know and inquire into the procedure used prior to trial and the failure of the Government to make inquiries prejudiced the defendant.

POINT III

<u>The summation of the Government was improper</u>.

As suggested in our main brief, we believe that a reading of the Government's summation in this case manifestly displays the impropriety of the prosecutor's remarks, each one of which was specifically objected to at the time it was made. We have urged the Court to do this and repeat the request. We do not understand the Government's reference to the "detached form as presented by the defendant" (Government's brief, p. 9), but rely on all of the things to which objection was taken at the time. Surely a remark by a prosecutor that the number of bank robberies is increasing is so improper so as to not require extended discussion. Indeed, the Court's advice to the jury on the occasion of our objection that that may be true compounded the prejudice. The Government's attempt to claim that the remarks of defendant's counsel were improper on summation cannot withstand scrutiny. Defendant's counsel advised the jury that the witness Debose admitted telling lies on many previous occasions to escape punishment. It was proper for defense counsel to argue to the jury that they could find from the evidence that the witness Debose and the witness Wright were lying about the division of the bank robbery money at her apartment to avoid criminal liability. The only explanation for the ability of Debose to pay Wright

$10 at her apartment was the fact that the money had been divided while he was there.

We leave to this Court the propriety of a prosecutor telling the jury in his summation that by defendant he means defense counsel and thereafter telling the jury the defendant did not tell you all the truths.

At page 11 of the Government's brief the suggestion is made that anything improper in the Government's summation was provoked by an improper summation by defense counsel (Government's brief, p. 11, footnote). We stand on the record in this case and believe that a review of both summations by the Court shows the citation to the cases contained inappropriate.

Apparently attempting to point out improper conduct of the defendant's counsel, the Government refers to the gum chewing remark. We decline the invitation to burden this Court regarding that incident.

We are astounded by the claim of the Government in the second footnote at page 11 of its brief that we have not preserved our claim on appeal regarding the prosecutor's comment

on the failure of the defendant to take the stand. We speak of the prosecutor's statement to the jury in his closing remarks that the "defendant didn't tell you about all the truths" (Government's summation, p. 25). We objected to the remark when made (ibid.). We promptly moved for a mistrial specifically making this very point (Government's summation, p. 45). The claim by the Government that we should now be precluded from raising this on appeal is without merit.

Additionally, and with respect to the truths which the prosecutor mentioned to the jury in his summation, we claim that the statements of the prosecutor that there was a meeting at the house and "that was the truth" and that Burse, Darrell Debose and Gary Green went to Evon Wright's house and "we know that was the truth" and that "they came back to Evon Wright's and that was the truth" constitutes an expression on the part of the prosecutor of his personal belief in those things and constituted further prejudice to the defendant. (See the comments of Judge Curtin, Tr. 923, 924 "Is that the District Attorney testifying here; is that proper?").

The statement at page 12 of the Government's brief that the defendant does not allege any inaccuracy in the

Government's summarization provokes this response. It was inaccurate for the Government in its summation to attempt to mislead the jury that his principal witness was in jail on Federal charges when he was interviewed by the defendant's attorney. It was inaccurate and improper for the Government in its summation to attempt to tell the jury what was contained in the written statement of Debose, since it was not in evidence.* It was inaccurate for the Government to attempt to convince the jury that defendant's witness Louise Stevens testified that she was under the influence of alcohol at the time she saw the defendant outside his apartment on the day of the robbery. The fact was that she testified that she took a drink on every day of the year, but may have been in the influence of alcohol when she talked to the F.B.I. agent and told him that she had seen the defendant Burse outside his apartment the day the bank was robbed. It was inaccurate for the Government to seek to have the jury draw the inference that the person who accompanied Debose (if there was one) was not depicted in the bank camera because he "could have been" elsewhere when the pictures were being taken. In this regard

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* It was not improper for the defendant's counsel to point out to the jury that the written statement did not contain the name of the defendant Burse, since this was specifically brought out on cross-examination of Debose at page 429-30.

we state that it is not improper for a prosecutor to seek to have the jury draw inferences from the evidence, but here the only evidence presented was that the defendant Burse was standing directly in front of the bank camera. There was no evidence presented by anyone that he was standing elsewhere. In this regard the Government's brief that it was urging the jury that he was not in the range of the cameras is not the argument that was made. The argument that was made was that he could have been elsewhere. But no evidence was presented that would have supported such a determination.

POINT IV

Was the trial fair?

The Government in its attempt to satisfy this Court that the defendant received a fair trial does not explain its failure to turn over the exculpatory statement of Debose that it was Jimmy Barner who robbed the bank. The defendant was indicted at the end of August, 1974. The defendant made three attempts to secure Brady material before the United States Magistrate. The Government consistently denied that there was any Brady material. It was only at the trial of the

unindicted co-conspirator Green in August, 1975* that the Barner statement was discovered through the independent efforts of defendant's counsel. No justification is given for the Government's failure to turn this material over as required under Brady during the year preceding.

Likewise, the Government's attempt to justify its question of defendant's witness Craig Burse as to why he did not immediately go to the Lackawanna police department when he discovered his brother had been indicted for robbing the bank when he was at home is completely ineffective. The question is completely improper. The inference that one is required to do so is improper and the claim that the Lackawanna police department could have done something about it in any event is ludicrous.

The Government nowhere attempts to justify its subpoenaing of numerous witnesses on a day when the case had not been scheduled for trial. No explanation is given because there can be none.

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* Not 1974 as claimed in the Government's brief at page 15.

These things are cumulative of the fact that the procedures followed in this case were unfair and prejudiced the defendant. The Government obtained an indictment on hearsay testimony when non-hearsay testimony was readily available. It did so for the sole purpose of depriving the defendant prior sworn statements of witnesses. Thereafter, the Government failed to produce Brady material in spite of repeated motions for such production for a period of eleven months. The Government then failed to the prejudice of the defendant to reveal the impermissive procedure regarding the photographs as displayed to the witness Anna Debose. During the trial the Government engaged in improper cross-examination of defendant's witness Craig Burse and engaged in a summation containing many improprieties. Finally, the Court failed to charge the jury the requested alibi instruction and to inform the jury regarding the statutes which were requested. The sum total of these unorthodox procedural deficiencies requires a reversal of the conviction.

POINT V

In this close case the conviction should be reversed and the indictment dismissed.

The Government in its brief claims that the evidence against the defendant was overwhelming (Government's brief,

p. 22). We believe that a review of the entire transcript of the trial adequately demonstrates that the evidence was not overwhelming and that there exists after such a review an abiding doubt as to whether or not the defendant or his brother robbed the bank. The identification of the defendant by the witness is very weak and the motive of the conspirator for testifying falsely is amply demonstrated. We do not claim the evidence is insufficient as a matter of law because of the oft cited rule that the uncorroberated testimony of a co-conspirator is of itself sufficient to raise a jury question in Federal courts. United States v. Ferrara, 458 F. 2d 868 (1972). It is precisely because the proof is so susceptible of a determination of the defendant's innocence rather than guilt that the errors require reversal. But more than that, the failure of the Government to present direct evidence to the Grand Jury requires dismissal of this hearsay indictment. The fact that the United States Supreme Court more than 20 years ago declined to exercise its supervisory powers with respect to hearsay indictments does not mean that this Court should fail to execute its supervisory powers. Indeed, the Costello case has not prevented this Court from so doing in the cases cited in our main brief. The Government chooses not to discuss those

many cases wherein this Court issued admonitions and warnings. The Government does not claim here or could it claim that the failure to present the testimony of the witness Barbara Ramos, the testimony of the witness Evon Wright and the testimony of the witness Anna Debose was because these witnesses were not available or some other compelling reason recognized by the cases. The only reason why the Government chose to proceed to obtain an indictment based solely on hearsay testimony was so that defendant's attorney would not have the benefit of prior sworn statements when the case came on for trial. In light of the above the claim in the last line of the Government's brief that a reversal of this conviction would "undermine respect for the administration of justice" is most inappropriate. An affirmance of this conviction would have that very effect since it would be a signal to prosecutors that this Court's prior admonitions and warnings are nothing more than precatory language "full of sound and fury signifying nothing".

Conclusion

For all of the above reasons the conviction on the conspiracy count should be reversed and in order to signal

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

Cheryl C. Cheape, being duly sworn, deposes and says that she resides at 144 Victoria Boulevard, Kenmore, New York and is over the age of 21; that on the 26th day of February, 1976, she served two copies of the annexed Reply Brief upon the United States Attorney, attorney for the United States of America in the within entitled action, by depositing true copies of same properly enclosed in a postpaid wrapper in a Post Office box regularly maintained by the United States Government at 10 Lafayette Square, Buffalo, New York, directed as follows:

United States Attorney
United States Court House
Buffalo, New York 14202

that being the address designated by him for that purpose upon the preceding papers in this action.

Cheryl C. Cheape

Cheryl C. Cheape

Sworn to before me this 26th
day of February, 1976.

Helen B. Gerber

HELEN B. GERBER
Notary Public, State of New York
Qualified in Erie County
My Comm. Expires March 30, 1977

United States Attorneys in this Circuit that this Court means what it says in its promulgated opinions the indictment should be dismissed.

Dated: Buffalo, New York
February 26, 1976

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